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No. 97-805

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM MULDERIG,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE CIRCUITS ON THE DUE PROCESS STANDARD FOR PREINDICTMENT DELAY

A. A Split in the Circuits Exists as to the Test for Determining a Due Process Violation Based upon Preindictment Delay

In opposing certiorari to an earlier petition before this Court, the Solicitor General acknowledged the existing conflict among the circuits regarding the standard for due process claims of prejudicial prosecutorial delay and stated that the issue was an important one warranting review by this Court. The Solicitor General opposed that earlier petition on the grounds that (unlike here) there had been no finding of actual prejudice. (*See* Pet. at 14). Confronted now with a case in which the district court held that the defendant suffered prejudice,[1] and unable to avoid the import of its prior concession, the Solicitor General fashions a new and fundamentally flawed rationale for opposing certiorari.

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[1] The government did not cross-appeal the district court's determination that Mulderig had suffered actual and substantial prejudice. Yet the Solicitor General improperly attempts to assert that Mulderig's showing of prejudice was not sufficient to constitute prosecutorial misconduct. (*See* Opp. Br. at 12 n.8). Ignoring the express language of the district court's decision, the Solicitor General asserts that the district court's decision "does not appear to have been based on a determination that the lost testimony or documents would in fact have been exculpatory." (*Id.*) After an extensive evidentiary hearing, the district court conclusively held that Mulderig was "prejudiced by the delay in bringing this indictment, specifically in the loss of Mr. Burn [his accountant] as an exculpatory witness and in the loss of the supporting documentation." (App. 47a-48a) (emphasis added); (*see also* Pet. at 3-6).

The Solicitor General asserts that "petitioner's claim would not have succeeded even had it arisen in a court following the minority, balancing approach." (Opp. Br. at 13). This assertion is based on the faulty premise that "[w]hen the defendant fails to show that the government delayed the indictment to obtain a tactical advantage for some other bad faith reason, . . . the courts that apply the balancing test have to date uniformly denied relief." (*Id.*) The Solicitor General is wrong.

Not only have the circuit courts themselves recognized the split of authority as to the standard for due process claims of preindictment delay, but the circuit courts following the balancing test have repeatedly affirmed the dismissal of indictments even absent a showing of improper prosecutorial motive. For example, in *Howell v. Barker*, 904 F.2d 889 (4th Cir.), *cert. denied*, 498 U.S. 1016 (1990), the Fourth Circuit affirmed the finding of a due process violation based on preindictment delay and explicitly rejected the contention that a defendant who has shown prejudice must also prove improper prosecutorial motive. The court determined that delay resulting from the government's negligence or justified by "mere convenience" sufficed under the balancing test to establish a due process violation. *Howell*, 904 F.2d at 895. *See also United States v. Glist*, 594 F.2d 1374, 1378 (10th Cir. 1979) (affirming dismissal on the basis of preindictment delay, even though "there may have been no deliberate intention on the part of government agents to deceive").

Similarly, in *United States v. Barket*, 530 F.2d 189 (8th Cir. 1976), the Eighth Circuit, having affirmed the district court's finding that a 47-month delay in bringing the indictment caused substantial prejudice to the defendant, upheld the dismissal of the indictment against the defendant. In balancing the substantial prejudice caused by the preindictment delay against the government's reasons for that

delay, the Eighth Circuit "employ[ed] a 'delicate judgment' based upon the circumstances" of the case. *Id.* at 193 (quoting *United States v. Marion*, 404 U.S. 307, 325 (1971)). The Eighth Circuit rejected the government's argument that "an additional showing that the Government intentionally engaged in delay to gain tactical advantage over the defendant" was required to compel dismissal, finding that "governmental negligence" was enough. 530 F.2d at 194-95.

Federal district courts have repeatedly dismissed indictments for unconstitutional preindictment delay under the balancing test without requiring a showing of intentional tactical delay by the government. For example, in *United States v. Sabath*, No. 97 CR 110, 1998 WL 21649 (N.D. Ill. Jan. 12, 1998), the district court dismissed an indictment on the basis of prejudicial preindictment delay, where the government's conduct had been "reckless." *Id.* at *15. The court stated that "given the extreme prejudice caused by the government's long delay, even negligence on the government's part would violate Defendant's due process rights." *Id.* at *13. *See United States v. Corral-Chaidez*, No. 79 CR 508-5, 1987 WL 9577, at *2 (N.D. Ill. Apr. 6, 1987) (dismissing for pre- and post-indictment delay where government made no effort to notify defendant of indictment); *United States v. Sample*, 565 F. Supp. 1166, 1186 (E.D. Va. 1983) (dismissing for delay caused by "temporizing, fumbling, lost motion, ineffectiveness and neglect").

Moreover, the lack of prosecutorial and investigative personnel is not a legitimate reason for lengthy preindictment delay. *See, e.g., United States v. Anagnostou*, 974 F.2d 939, 943 (7th Cir. 1992) (excessive workloads and staff turnover are "hardly a compelling justification" for a long preindictment delay), *cert. denied*, 507 U.S. 1050 (1993). Here, the government admitted that lack of personnel was the reason for the nearly ten-year delay in bringing this case.

(App. 3a). Accordingly, a court applying the balancing test in this case would likely dismiss Mulderig's indictment in light of the actual and substantial prejudice he suffered resulting from the government's delay.

In sum, the direct and longstanding conflict among the circuits, as well as among state courts of last resort (*see* Pet. at 13 n.5), is real and warrants resolution by this Court.

B. Discovery Should Be Allowed On the Issue of Prosecutorial Motive

In arguing that no discovery was necessary as to the prosecutor's motive, the Solicitor General cites three cases: *United States v. Muniz*, 1 F.3d 1018 (10th Cir.), *cert. denied*, 510 U.S. 1002 (1993); *United States v. MMR Corp.*, 954 F.2d 1040, 1046 (5th Cir. 1992); *United States v. Valona*, 834 F.2d 1334 (7th Cir. 1987). None of these cases addresses the circumstance in which the defendant has demonstrated, and the court has found, prejudice resulting from delay in bringing the indictment. Instead, those cases simply hold that a defendant who is unable to demonstrate any prejudice, a threshold requirement, will not be granted an evidentiary hearing as to the reason for the prosecutor's delay. *See Muniz*, 1 F.3d at 1024; *Valona*, 834 F.2d at 1337-40. That holding is not relevant in the instant case.

Where a court adopts a test which places the burden on the defendant to establish both bad faith delay and prejudice (the test adopted by the Fifth Circuit), to deny the defendant discovery erects an insurmountable obstacle for all defendants and mocks due process.

II. THE STATUTE OF LIMITATIONS ISSUE PRESENTS A CONFLICT AMONG THE CIRCUITS AND AN IMPORTANT QUESTION OF STATUTORY INTERPRETATION THAT SHOULD BE RESOLVED BY THIS COURT

The Solicitor General's brief mischaracterizes the holdings of the relevant case law from the Tenth and Sixth Circuits. Those circuits have held that a waiver of a criminal statute of limitations may only be effected expressly and knowingly and that the failure to raise such a defense at or before trial does not waive the right of a defendant to raise it after trial, including for the first time on appeal. *See Waters v. United States*, 328 F.2d 739 (10th Cir. 1964); *United States v. Cooper*, 956 F.2d 960 (10th Cir. 1992); *United States v. Del Percio*, 870 F.2d 1090 (6th Cir. 1989).

In *Waters*, 328 F.2d at 742-43, the Tenth Circuit permitted the appellant to raise a statute of limitations defense for the first time on appeal. Contrary to the assertion of the Solicitor General, *Waters* is still the law of the Tenth Circuit. The Solicitor General argues, in essence, that in *United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987), the Tenth Circuit reversed its position in *Waters*. (Opp. Br. at 17). This assertion disregards the wording of the Tenth Circuit in *Cooper*, which reaffirmed its holding in *Waters* and acknowledged the existence of a split of authority:

> Although *Waters* has been questioned by other courts, it has never been overruled by our en banc court. Some, including the district court in this instance, have suggested the *Waters* holding was abandoned by the court in *Gallup*, but we see no basis for that conclusion.

956 F.2d at 961 (citation omitted). Notwithstanding this clearly phrased repudiation, the Solicitor General insists on the same discredited reading of *Gallup*.

Although the Solicitor General attempts to distinguish *Cooper* on the facts, *Cooper* is directly relevant here. In *Cooper*, the defendant "raised the statute of limitations for the first time in the district court as soon as its applicability was evident to anyone." 956 F.2d at 961. Mulderig also raised the statute of limitations in the district court as soon as its applicability became evident, prior to sentencing.

The Solicitor General also mischaracterizes the Sixth Circuit's decision in *United States v. Del Percio*. (*See* Opp. Br. at 21 n.13). In *Del Percio*, the Sixth Circuit specifically affirmed its refusal in *Benes v. United States*, 276 F.2d 99 (6th Cir. 1960), to find a waiver where the defendant "did not *explicitly* agree to extend the limitations period." 870 F.2d at 1093. Thus, *Benes* remains the law of the Sixth Circuit.

The Solicitor General is mute on Mulderig's argument that even if a statute of limitations defense can be waived absent an express and knowing waiver, the express wording of the relevant statute, 18 U.S.C. § 3282, permits a statute of limitations defense to be raised up until sentencing. (*See* Pet. at 20-23). Instead, the Solicitor General contends that (i) the statute of limitations defense is, on its merits, without foundation and (ii) Mulderig's motion raising that defense was precluded under *Carlisle v. United States*, 517 U.S. 416, 421 (1996). (*See* Opp. Br. at 20).

First, at the time of Mulderig's trial and sentencing the applicable limitations period for Counts 1 and 2 of the Indictment was five years: "no person shall be prosecuted, tried *or punished* . . . unless the indictment is found or the information is instituted within five years [of the offense]." 18 U.S.C. § 3282 (emphasis added). At the time of his trial

and again at the time of his sentencing, the indictment was not found within five years of the commission of the alleged offense, but rather Mulderig had been indicted nearly ten years after the offenses in question.

Accordingly, the Solicitor General's reliance on *Carlisle* is misplaced. A rule of procedure cannot be used to eviscerate a defense expressly granted to defendants by Congress, *i.e.*, the right to assert a statute of limitations defense to challenge an untimely imposition of sentence. By granting that right, Congress expressly granted the right to assert it up until the time of sentencing in cases such as this, where the limitations period was changed.

Second, the Solicitor General cites no case law supporting its contention that "the timely filing of an indictment renders irrelevant any later shortening of the statute of limitations." (Opp. Br. at 20).[2] Indeed, *Bridges v. United States*, 346 U.S. 209, 224-226 (1953), a case relied upon by the Solicitor General, holds otherwise. In *Bridges*, this Court held that once Congress repealed a statute of limitations, that statute has no ongoing effect unless Congress so provides by enacting an express "savings" clause to preserve the repealed statute's effect on current defendants. *See Bridges*, 346 U.S. at 226-27; *see also United States v. Obermeier*, 186 F.2d 243, 254-56 (2d Cir. 1950), *cert. denied*, 340 U.S. 951

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[2] The Solicitor General's citation of *United States v. Schmick*, 904 F.2d 936, 940-41 (5th Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991); *United States v. Elliott*, 849 F.2d 554, 561 (11th Cir. 1988) and *United States v. Grady*, 544 F.2d 598, 601-02 (2d Cir. 1976), is inapposite. Those cases stand for the uncontroverted and wholly irrelevant proposition that a superseding indictment which follows and does not broaden a timely filed initial indictment is itself timely even if the statute of limitations would have otherwise expired.

(1951). No such "savings" clause was enacted when Congress repealed the limitations period for violations of 18 U.S.C. § 1008 contained in 18 U.S.C. § 3293(1).

Finally, the rule that the Solicitor General relies upon (*i.e.*, that an indictment tolls the statute of limitations) applies only to cases where the timeliness of a subsequent indictment is at issue. In other words, the rule applies to situations in which the running of the statute is tolled from the date of the initial indictment until some subsequent event (*e.g.*, dismissal of the indictment) causes the statute to begin to run again. This rule has no application where, as here, the statute of limitations is erased altogether; in such cases, there is quite simply no statute to toll.

III. IN HOLDING THAT A FACTUALLY TRUE STATEMENT CAN BE THE BASIS OF A CONVICTION UNDER 18 U.S.C. § 1008, THE FIFTH CIRCUIT MISINTERPRETED THE CLEAR LANGUAGE OF THE STATUTE AND CONTRAVENED THE REASONING OF *BRONSTON v. UNITED STATES*, 409 U.S. 352 (1973)

William Mulderig was tried and convicted for violating 18 U.S.C. § 1008.[3] That statute required, as an element of the crime, a "false" "statement." (App. 65a). The statement which the government alleges to be false is a K & K financial statement dated July 23, 1984.

Though conceding that the financial statement was (i) true at the time it was dated and (ii) never altered, the government argues that the statement was rendered false by subsequent, surrounding events. (Opp. Br. at 22). The

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[3] 18 U.S.C. § 1008 was repealed effective Aug. 9, 1989. *See* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73 § 961(g)(1), 103 Stat. 183, 500.

government maintains that in transmitting the financial statement to the bank by a cover letter dated February 1985, the defendant implied that the financial condition of K & K was exactly the same on that date as it was on July 23, 1984.

The first and obvious problem with this argument is that if the cover letter gave the false impression that the July 1984 financial statement reflected the company's condition in February 1985, it was the cover letter and not the financial statement that was false. In other words, a true document does not become false merely because a second document mischaracterizes that true document. Second, the February cover letter was not false, *i.e.*, it did not mischaracterize the K & K financial statement. The cover letter, in relevant part, simply stated: "Enclosed please find financial statements regarding William M. Mulderig and K & K Financial Services, Ltd." (App. 29a). This statement is true.

Given that both the 1984 financial statement and the 1985 cover letter were true, the government, in an effort to sustain the conviction under 18 U.S.C. § 1008 for filing a false statement, is left to argue that if someone is misled by two statements when read together, then each statement must necessarily be false.[4] (Opp. Br. at 22-23). This argument is precluded by *Bronston v. United States*, 409 U.S. 352 (1973).

The rule of *Bronston* is that literally true statements made to create a misleading impression do not constitute false statements. (*See* Pet. at 24-26). The Solicitor General

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[4] Logicians refer to this reasoning as the "fallacy of division" -- the fallacious argument that what is true of the whole must also be true of its parts. (*E.g.*, that a machine is heavy does not permit the conclusion that each of its parts is also heavy). *See* Irving Copi & Carl Cohen, *Introduction to Logic*, 197 (Prentice Hall 1998).

(relying on *Bronston*, 409 U.S. at 358 n.4) suggests that the rule is limited to situations in which a misleading statement is made in response to a question posed by a third party; it does not, the government asserts, apply to fraudulent communications initiated by the defendant. The claimed logic of this is that since another party initiates the communication and frames the request, that party can, and must, restate the request to clarify any ambiguity in the response.

The government's attempt to distinguish *Bronston* fails for two reasons. First, no court has so limited *Bronston*, and at least four circuits have expressly applied *Bronston* to statutes that cover fraudulent communications initiated by the defendant. (*See* Pet. at 25). Second, even if *Bronston* is as limited as the government suggests, the instant case is still covered by *Bronston*: Mulderig did not initiate the communications that are at issue in this case. Both the K & K 1984 financial statement and the February 1985 cover letter 1985 were sent to the bank by Mulderig at the bank's request. The bank dictated what it wanted for its files, and it was the bank which, if Mulderig's submissions proved incomplete, had a duty to clarify or amend its requests.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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